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No. 84-1936

In The
Supreme Court of the United States
October Term, 1984

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY and STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY

Petitioners,

v.

TIMOTHY JANOWIAK

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent respectfully disagrees with the petitioners' statement of the question presented for review. The following is a more factually accurate statement of the question which would emerge from examination of the record below:

> Does 42 U.S.C. § 2000(e) and the Constitution permit a public employer to adopt an affirmative action plan that discriminates against non-minority applicants where the only evidence of discrimination against minority applicants is that their percentage of representation on a municipal fire department is less than their percentage of population in the community?

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Respondent, Timothy Janowiak, respectfully requests that this Court deny the petition for a Writ of Certiorari, seeking review of the opinion below by the United States Seventh Circuit Court of Appeals. That opinion is reported at 750 F. 2d 557 (7th Cir. 1984), and is contained in petitioners' Appendix at pages 6a-3a.

Respondent accepts petitioners' titled parties, Reports of Opinion below (Pet. 1), and Jurisdiction (Pet. 2), and Constitutional and Statutory Provisions (Pet. 2, 3). The jurisdictional statement is accepted only to the extent it concerns jurisdictional and not substantive issues.

STATEMENT OF THE CASE

Respondent believes petitioners' Statement of the Case and Facts (Pet. 3 through 9), are accurate and adopts the same, with two additions:

A. Respondent had the second highest test score of all applicants.

B. One of four (4) minority recruits hired failed a pension physical, and was replaced with another minority applicant.

REASONS WHY THE WRIT SHOULD BE DENIED.

A. Respondent prays this Court to deny petitioners' Request for a Writ of Certiorari for the reason that the 7th Circuit Court of Appeals did not error in holding that mere numerical disparity between the percentage of minorities in the defendant Fire Department and the percentage of minorities within the City of South Bend was insufficient to justify implementation of an affirmative action plan.

The cases cited by petitioners do not support the proposition that mere statistical disparity is sufficient grounds for adoption of an affirmative action plan, or if they do, are in conflict with

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and other Supreme Court decisions.

It has been established by this Court that in order to adopt and implement an affirmative action plan, the " . . . governmental body must have the authority to act in response to identified discrimination. Second, the governmental body must make findings that demonstrate the existence of illegal discrimination." Fullilove v. Klutznick, 448 U.S. 448, 65 L.Ed. 2d, 902, p. 937, 100 S. Ct. 2758.

Petitioners suggest that the Court of Appeals misinterpreted the Weber decision, and state that all that needs to be demonstrated is mere statistical disparity of numbers for a plan to survive Title VII scrutiny.

The Appellate Court, in its Opinion rendered December 6, 1984, correctly noted that this Court in Weber emphasized that the legality of the

affirmative action plan under Title VII rested upon a finding of " . . . conspicuous racial imbalance in traditionally segregated job categories." Weber, supra, 443 U.S. at 209.

As the Appellate Court noted at page nine (9) of its December 6, 1984, Opinion, " . . . as discussed previously, the Supreme Court's only decision addressing the issue of an affirmative action plan under Title VII hinged on the Court's finding of purposeful exclusion of blacks from the craft unions." Weber, supra, 443 U.S. 193

Furthermore, this Court's inquiry in Weber was " . . . the narrow statutory issue of whether Title VII forbids private employers and unions (emphasis added) from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and purposes provided in the Kaiser-USWA plan . . . " Weber, 61 L.Ed. 2d, pp. 487-488.

It is not insignificant that the instant case

involves a governmentally imposed affirmative action plan, and not a voluntary private agreement of the type attacked in Weber, and in Lehman v. Yellow Freight System, Inc., 651 F. 2d 520 (7th Cir. 1981). In fact, as the 7th Circuit Court of Appeals noted in Lehman, statistical data constitutes " . . . the first step (emphasis added) in assessing whether (an) employer decides properly to institute an affirmative action plan." Lehman, supra, p. 257.

Although race-conscious plans do not as a matter of law, violate Title VII, they must be based upon findings of past discrimination. Fullilove V. Klutznick, 448 U.S. 448, 498 (1980); Bratton v. City of Detroit, 704 F. 2d 878, 886 (6th Cir. 1983), Cert. denied, 460 U.S. 1041.

Petitioners cite Weber to support its contention that in its reversal of the 5th Circuit, the Supreme Court did not find in the record any evidence of wrongdoing which might have been overlooked

by the lower courts. Petitioners ignore the concession made by Kaiser that its hiring practices were subject to question, Weber, supra, p. 493, and further ignore Justice Blackmun's position that the majority opinion (in Weber) authorizes affirmative action plans if the job category has been "traditionally segregated. Weber, supra, p. 494.

Another distinguishing feature in Weber was that the majority of the Court found that the voluntary plan did not unnecessarily trammel the interests of the white employees. The Court noted that the plan did not require the discharge of white employees, nor did the plan create an absolute bar to the advancement of white employees, as half of those trained in the program would be white. Weber, supra, 492.

In the instant case, the plan adopted by the petitioners was a quota, which did create an absolute bar for all but one white employee. As noted

previously, Weber involved a voluntary, private plan, and not a government imposed plan that from the evidence adduced from the Board of Public Safety minutes did not even pay lip service to non-minority applicants.

The petitioners' claim that the Opinion rendered below is in conflict with Weber and similar cases is misplaced. It is petitioners who have misread Weber, and not the 7th Circuit Court of Appeals.

Petitioners cite Bushey v. N.Y. State Civil Service Commission, 733 F. 2d 220, (2nd Cir. 1984) as support for its assertion that statistical disparity alone validates an affirmative action plan and insulates it from Title VII attack.

The "statistical disparity" in Bushey involved an administrative examination wherein the passing rate for minorities was approximately one-half the passing rate for non-minorities. In Bushey, the testing procedures themselves were found to have a

significant discriminatory impact upon minorities. Bushey does not stand for the proposition advanced by petitioners and did not even touch upon the issue argued herein, namely, that underrepresentation of a particular group, race, etc., without meaningful inquiry as to the reasons for said underrepresentation, is insufficient to establish an affirmative action plan which discriminates against others.

Furthermore, in Bushey, the Second Circuit noted that:

> "A prima facie violation of Title VII may be established by statistical evidence showing an employment practice has the effect of denying members of one race equal access to employment opportunites." Bushey, supra, 224.

Neither Weber, supra, nor Bushey, supra, and certainly not Regents of the University of California v. Bakke, 438 U.S. 265 (1978), support the assertion made by petitioners that mere statistical disparity of numbers is sufficient evidence upon

which a governmentally imposed racial hiring quota can be imposed.

Regarding petitioners' contention that a conflict exists between the 7th Circuit in its Opinion below, and the Ninth Circuit, in Johnson v. Transportation Agency, Santa Clara County, California, 748 F. 2d 1308, (9th Cir. 1984), a conflict perhaps does exist.

That case stands for the apparent proposition that mere numerical disparity justifies implementation of an affirmative action plan. It is significant to note, however, that plaintiff Johnson did not bring an action under 42 USC 1983, but for reasons best known to Johnson, opted to proceed solely under Title VII, 42 USC 2000(e). As this Court noted in Bakke, supra, the constitutional standard to be applied is one of strict scrutiny, as racial and ethnic distinctions of any sort are inherently suspect. Bakke, supra, p. 751. As noted in Bakke, where appropriate

findings of discrimination are made, a government may take race into account to remedy disadvantages cast on minorities. Bakke, supra.

To the extent that Johnson, supra, did not deal with a Fourteenth Amendment claim by plaintiff, that case is distinguishable. To the extent that Johnson holds numerical disparity is sufficient to insulate an employer from attack under Title VII, 42 USC 2000(e), that case is in conflict with Bratton, Fullilove, supra, and Bakke, supra, the latter two cases being of precedental import by virtue of being opinions of the United States Supreme Court.

Petitioners further allege a conflict between the 7th Circuit ruling and the Eighth Circuit, Warsocki v. City of Omaha, 726 F. 2d 1358 (8th Cir. 1984) and Sixth Circuit. Bratton v. City of Detroit, 704 F. 2d 878 (6th Cir. 1983), Cert. denied, ___U.S.___, 104 S. Ct. 703 (1984).

Warsocki held as follows that:

". . . to establish the bona fide nature of an affirmative action plan, an employer must show that its affirmative action plan was a response to a conspicuous racial imbalance in its workforce." Warsocki, supra, p. 1360.

Regarding Warsocki, the trial court granted the defendant's Motion to Dismiss after plaintiff had rested his case. The Eighth Circuit noted that the burden was on the defendant to demonstrate that its affirmative action plan was substantially related to the objective of remedying past discrimination, in a reverse discrimination suit. Warsocki, p. 1360.

Bratton v. City of Detroit, 704 F. 2d 878 is cited by petitioners as holding in conflict with the Opinion below. Petitioners quote the following passage from Bratton as support for their position that mere statistical disparity of numbers is sufficient evidence to insulate an employer from consititutional attack:

"A direct showing of past intentional discrimination is not required to

> establish the existence of this interest (to establish a valid governmental interest and to uphold an affirmative action plan). Bratton, supra, p. 886.

The above citation, respondentasserts, is taken out of context. Bratton held, inter alia, that to survive Title VII scrutiny, an affirmative action plan must be aimed at breaking down prior patterns of segregation, and racial hierarchy, and must not unnecessarily "trammel" non-minority interests. Bratton, supra, p. 884. Furthermore, the Court in Bratton noted that the record supported:

> " . . . numerous instances of discriminatory practices in hiring, promotion . . . and the day to day treatment of black officers evidenced a systematic exclusion of blacks from any meaningful role on the Detroit Police Department." Bratton, supra, p. 889.

The Court further held that a court, in passing on the constitutionality of an affirmative action plan, must determine as a threshhold matter that discrimination against minorities exists. Bratton,

supra, p. 886. There exists no conflict between the Seventh and Sixth Circuits.

Despite petitioners' assertions to the contrary, with the possible exception of Johnson v. Transportation Agency, Santa Clara County, California, 748 F. 2d 1308 (9th Cir. 1984), not a single case supports petitioners' claim that all a public employer needs to show to establish a race conscious hiring plan, is that minority representation on a given fire department is not in line with minority representation in the community as a whole. That is not the law.

Petitioners' contentions that the Seventh Circuit's Opinion renders it virtually impossible for a public employer to ever adopt an affirmative action plan is without merit.

Voluntary affirmative action plans adopted by public employers have survived attack, as this Court is well aware. The problem encountered by petitioners is that the evidence, or lack thereof

below, contained in the South Bend Board of Safety Minutes and Reports made in connection with the City's drive to establish an affirmative action plan, reveals a total lack of meaningful inquiry as to whether such a plan was needed. The rights of non-minority applicants were totally ignored. The true motivations of petitioners are certainly open to question when its (petitioners) own task force found the existing testing procedures fair, reasonable and non-discriminatory.

Lastly, as this Court opined in Bakke, supra, where appropriate findings of discrimination are made, a government may take race into account to remedy disadvantages cast on minorities. Bakke, supra, 438 U.S. 265, 57, L.Ed. 2d 750, 98 S. Ct. 2773.

CONCLUSION

The decision reached by the Seventh Circuit Court of Appeals was correct. Before the right of non-minority citizens can be infringed upon in hiring and promotion practices by a public employer, evidence that indicates discrimination against minorities exists, must be shown.

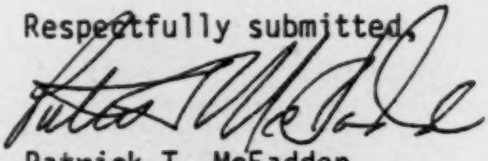
In the case below, the Task Force appointed by the petitioner City, found the pre-1980 testing procedures to be fair, reasonable, and non-discriminatory. (Pet. Appendix 9a, 10a, 11a). The Seventh Circuit correctly held that an employer must proffer something more than a finding of statistical disparity between the percentage of minorities employed and the percentage of minorities within the community to justify the adoption of an affirmative action plan.

Finally, lest the crux of the Appellate Court's decision be forgotten, the ruling of

December 6, 1984, simply held that the district court errored in granting petitioners' Motion for Summary Judgment. Whether or not the petitioners' actions were reasonable, and further, did not unnecessarily trammel the interests of non-minorities, presented issues of fact and law that should have precluded the granting of Summary Judgment.

For all the reasons set forth herein, the respondent respectfully prays that the petition be denied.

Respectfully submitted,



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